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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HELENE LEDERMAN, Plaintiff and Respondent, v. DAVID SCHWARCZ et al., Defendants and Appellants.	B195615 (Los Angeles County Super. Ct. No. BC307709)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo A. Torres, Judge. Reversed and remanded.

Steven R. Friedman for Defendants and Appellants.

Schomer Law, Scott P. Schomer and Erika W. Senter for Plaintiff and Respondent.

A woman's house was encumbered by liens which exceeded the house's value. An attorney entered into a transaction with the woman whereby: (1) she would become his client; (2) the client would give the attorney title to the house; (3) the attorney would pay the client $125,000 in the form of a down payment on a condominium in which she would live; (4) the attorney would use his legal skills to reduce the liens on the property, and pay the client an additional sum based on his success in removing the liens; and (5) after the liens were removed from the house, the attorney would transfer title to the condominium to the client. After taking title to the house, the attorney reduced the liens on the house but paid no additional sums to the client. The client brought suit against the attorney, and the jury found in favor of the client on her causes of action for breach of contract, breach of fiduciary duty, and fraud. The jury awarded substantial economic and non-economic damages to the client. Thereafter, the trial court considered the client's equitable cause of action for quiet title. After the trial court obtained the client's statement that she elected to void the contract, the court awarded title to both the house and the condominium to the client. The court then entered judgment in the client's favor quieting title to both properties, and awarding the full amount of damages found by the jury. The attorney appeals, asserting improper double recovery. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Underlying Transaction*

As the attorney does not contest the sufficiency of the evidence to support the jury's determination regarding liability, a full recitation of the facts is unnecessary for

the purposes of this appeal. We therefore briefly summarize the facts in the light most favorable to the judgment.

Helene Lederman owned a five bedroom house on Hillcrest Road in Beverly Hills (the Hillcrest house). Initially, Lederman owned the Hillcrest house with her husband, holding title as tenants in common. She and her husband separated in the mid-1980s, and divorced in 1992 or 1993. In 1991, prior to the divorce being final, Lederman's husband quitclaimed the Hillcrest house to Lederman.

Lederman's ex-husband was an accountant. He had taken money from his clients, and was criminally prosecuted and convicted for his misdeeds. As a result of his improper financial dealings, a number of judgments were entered against him, and a number of liens attached on the Hillcrest house. The timing of the judgments and the attachment of the liens, with respect to the Ledermans' separation and divorce, is not entirely clear. Lederman took the position that the great bulk of the liens were not enforceable against her, as the conduct which gave rise to them arose after the separation. It is undisputed, however, that at least *some* of the liens resulted from judgments in which Lederman herself was named along with her ex-husband.

In 1999, the Hillcrest house was worth between $1.6 and $1.65 million. Liens on the house exceeded $1.2 million, and may have been substantially greater than the value of the house itself.

Attorney David Schwarcz was aware of the liens against the Hillcrest house.[1] He arranged an introduction to Lederman, and presented himself as someone who could solve her problems. Attorney Schwarcz told Lederman that she was about to lose the Hillcrest house in foreclosure. He terrified her, telling her that the sheriff would lock her out without notice, and that she would be unable to get her clothes or feed her dogs. He told Lederman, however, that he was an experienced real estate attorney who could reduce or eliminate the liens. In return, Attorney Schwarcz wanted Lederman to sell the Hillcrest house to him and his wife, Caroline, at a reduced price. Specifically, Attorney Schwarcz offered Lederman an initial payment of $125,000, followed by an additional payment of no less than $750,000.[2] Depending on Attorney Schwarcz's success in reducing the liens, the second payment could be as high as $1.5 million.[3] Attorney Schwarcz led Lederman to believe that a payment of $1.5 million was very likely.

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[1] Attorney Schwarcz had previously represented one of Lederman's ex-husband's creditors, and had, in fact, recorded one of the judgment liens against the Hillcrest house.

[2] There is some confusion as to whether the guaranteed amount of $750,000 included the initial $125,000.

[3] According to Attorney Schwarcz, the liens on the property amounted to $2.8 million. He took the position that he had promised Lederman that, if his total payment on the liens was less than $1,375,000, he would pay Lederman the difference between $1,375,000 and the actual lien payoff amount. We note that, under this view of the transaction, Attorney Schwarcz had no financial incentive to work to reduce the liens below $1,375,000. Once the liens were reduced to that amount, Attorney Schwarcz would be required to pay out a total of $1,375,000, to someone. He thus would receive no benefit from any continued efforts to reduce the liens; he would simply end up paying Lederman any amounts he would have otherwise paid the lienholders.

Attorney Schwarcz agreed to reduce the entire agreement to writing (and prepare the necessary disclosures for a business transaction between an attorney and client to satisfy the Rules of Professional Conduct). In this regard, Attorney Schwarcz breached his fiduciary duties to his client, and defrauded her. He presented Lederman with a series of documents which: (1) failed to correctly reflect the terms of the parties' agreement;[4] (2) were unnecessarily confusing and at times incomprehensible;[5] and (3) were intended to placate Lederman while Attorney Schwarcz had no intention of actually complying with their terms.[6]

On April 21, 1999, Attorney Schwarcz attended a meeting with Lederman and brought a notary with him. Attorney Schwarcz told Lederman that the notary was in a hurry to get to another appointment, so Lederman had to sign the necessary document right away. Lederman then signed a grant deed, transferring title of the Hillcrest house

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[4] Specifically, Attorney Schwarcz took the position that he had never promised Lederman a guaranteed minimum payment of $750,000 and that, under the parties' agreement, if Attorney Schwarcz was not successful in reducing the liens, Lederman could end up with only $125,000 for her $1.6 million home. In this regard, we note one version of the agreement read, "Buyer shall pay Seller the sum of One Hundred Twenty Five Thousand ($625,000.00) [*sic*] Dollars."

[5] One version of the agreement stated, "If the difference between the actual payoff amount of liens is less than $600,000, then Seller shall have [certain rights]." This is incomprehensible; one cannot have a "difference between" "the actual payoff amount"; it must be compared with something else to have a "difference."

[6] Attorney Schwarcz testified that under the original deal Lederman would be guaranteed only $125,000, but that Lederman kept changing the deal, and ultimately demanded a written addendum that guaranteed her $750,000. Caroline Schwarcz refused to sign the addendum and told her husband to tell Lederman, "No deal." Instead, Attorney Schwarcz signed the addendum; at trial, he asserted that it was not binding because his wife had not signed it, among other reasons.

to FRNY, LLC, Attorney Schwarcz's "dummy corporation." After the notary left, Caroline Schwarcz was supposed to arrive with the $125,000 check and a promissory note for the remainder of the guaranteed payment to Lederman. Eventually, Caroline Schwarcz called and said she could not come. Attorney Schwarcz promised Lederman she would receive the funds and the promissory note soon. She never received the promissory note.

As to the initial payment of $125,000, Attorney Schwarcz convinced Lederman that it would not be a good idea for her to have the funds in her own name. Attorney Schwarcz instead offered to use that sum as a down payment on a condominium for Lederman. It was understood that the condominium would be Lederman's, even though title would be held by the Schwarczes. Once Lederman was no longer at any risk from the judgments against her and/or her ex-husband, the Schwarczes would deed the condominium to her. Lederman agreed to this arrangement, and Caroline Schwarcz purchased a condominium on Rexford Drive (the Rexford condominium) with a down payment of approximately $125,000.

2. *Performance and Breach*

The Schwarczes wanted to move into the Hillcrest house before Lederman was able to move into the Rexford condominium. Caroline Schwarcz arranged to move Lederman out of the Hillcrest house without advance notice. One day, Lederman came home to find a moving van in the driveway; many of her belongings had already been moved out of the Hillcrest house. As the Rexford condominium would not be large enough to hold all of her possessions, Lederman left many items in the Hillcrest house

with the Schwarczes' permission. The Schwarczes then moved Lederman's possessions into a storage facility; they never gave her the key. At trial, Caroline Schwarcz ultimately admitted that the Schwarczes stopped paying rent at the storage facility, and the facility sold Lederman's belongings. According to Lederman, the lost items were worth over $300,000.

Eventually, Lederman moved into the Rexford condominium. Lederman paid the mortgage, homeowners' association fees, and property taxes on the property. Attorney Schwarcz made a partial payment to Lederman of $60,000; she used these funds to make the necessary payments.[7] After a time, Lederman became frustrated that Attorney Schwarcz was not communicating with her regarding his progress in removing or negotiating down the liens. Lederman reached an agreement with Attorney Schwarcz that she would no longer make the mortgage payments on the Rexford condominium; Attorney Schwarcz would pay them as partial payment on the sums owed to her. She did, however, continue paying the homeowners' association dues and the property taxes for the Rexford condominium.

At some point, Lederman came home (to the Rexford condominium) and found documents belonging to Attorney Schwarcz and a locksmith's receipt; the Schwarczes

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[7] Attorney Schwarcz paid Lederman $60,000 in the form of a check to Providential Enterprises, a corporation which he had created. Attorney Schwarcz then had Lederman sign a lease, indicating that she was leasing the Rexford condominium from Providential. He then instructed Lederman to pay the mortgage on the Rexford condominium by writing checks on the Providential account. Attorney Schwarcz directed Lederman to sign the checks with the name of another individual, the President of Providential; she complied with his directions. In this way, there was no documentation indicating that Lederman made the mortgage payments on the Rexford condominium.

had apparently obtained entry into the Rexford condominium. At this point, Lederman stopped waiting for the Schwarczes to pay her the money that was due. On December 15, 2003, Lederman filed her complaint in this action against the Schwarczes and FRNY,[8] seeking damages and equitable relief.[9]

In response, Caroline Schwarcz brought an unlawful detainer action against Lederman. Armed with legal title to the Rexford condominium and a lease agreement in her favor on which Lederman's signature had been falsified, Caroline Schwarcz obtained a judgment evicting Lederman, and awarding damages of $69,762.[10]

During this time, the Schwarczes continued to live in the Hillcrest house. After negotiation, litigation, and payments, all of the liens on the Hillcrest house were removed. Attorney Schwarcz had refinanced the mortgage on the Hillcrest house in May 2000, and again in May 2002. He used approximately $910,000 of the funds obtained from the refinancing to pay down the liens on the Hillcrest house. He also used approximately $98,000 of his own money to pay the liens. However, after Lederman had filed the instant action against the Schwarczes, the Schwarczes chose to *purchase* one of the judgments against the Ledermans, rather than satisfy it. Thus, the

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[8] Unless otherwise indicated, or required by context, "Schwarczes" includes FRNY.

[9] The operative complaint sought to rescind the sale of the Hillcrest house and to quiet title to the Rexford condominium.

[10] There is no suggestion that this judgment has preclusive effect regarding the ownership of the Rexford condominium.

Schwarczes paid $282,500 to purchase a judgment which they could then use against Lederman.[11]

3. *Evidence at Trial*

At trial, Lederman introduced substantial evidence of the above-recited facts. As the resolution of this appeal turns on the issue of damages, we focus on the evidence introduced on that topic. Our discussion encompasses four areas: (1) the Hillcrest house; (2) the liens; (3) the Rexford condominium; and (4) the measure of damages presented to the jury. We briefly discuss each issue below.

a. *The Hillcrest House*

The parties disputed the fair market value of the Hillcrest house, at both the time of transfer in 1999 and the time of trial in 2006. According to Lederman's expert, the Hillcrest house was worth as much as $1.65 million in 1999, and $4.2 million at the time of trial. The Schwarczes' experts testified that the fair market value was less than $1.5 million in 1999, and only $3.725 million at the time of trial. Conflicting estimates were also offered as to the fair rental value of the Hillcrest house during the time the Schwarczes were in possession.

There was a mortgage on the Hillcrest house at the time of transfer to the

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[11] The record does not reflect whether Lederman was a named judgment debtor in that particular judgment. Attorney Schwarcz testified that the purchased judgment is a 1994 judgment against Lederman's ex-husband, but agreed that, by his wife's purchase of this judgment, she is now a creditor of Lederman herself.

Schwarczes, in the amount of no more than $275,000.[12] After Attorney Schwarcz had twice refinanced the Hillcrest house (in order to pay the liens), it was encumbered with a mortgage of $1,140,000.[13]

When the Schwarczes took possession of the Hillcrest house, it was not in pristine condition. Its precise state of disrepair was a matter of disputed testimony. According to the Schwarczes, they were required to make certain repairs in order to obtain refinancing. During Caroline Schwarcz's testimony, her attorney sought to elicit testimony regarding "things [she] started noticing in the property" after the Schwarczes had moved in. The trial court sustained its own objection. Defense counsel argued that this evidence was relevant to the affirmative defense of "offset." The court ruled that the evidence was irrelevant.

b. *The Liens*

There was a dispute in the evidence at trial as to the total amount of liens on the Hillcrest property. Lederman's expert testified to total liens of only $1,291,121, while Attorney Schwarcz testified to a total of $2.8 million. There were also substantial disputes in the testimony as to whether the liens would have been properly enforceable against the Hillcrest house had Lederman retained ownership. It was generally agreed that any liens which had attached *after* the Ledermans' divorce and had arisen solely

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[12] Apparently, the mortgage was listed at $275,000 on a preliminary title report. Attorney Schwarcz first testified that, after making one year of monthly payments, he paid off the mortgage for only $65,000, but later testified that the payoff was $205,000. Lederman's damage analysis expert calculated that if the mortgage were still in place at the time of trial, it would have had a balance of $145,500.

[13] There was apparently a third refinance in January 2003.

from misconduct of Lederman's ex-husband would not have been enforceable against Lederman. However, it is clear that not all of the liens arose under such circumstances. No lien-by-lien analysis was performed in which the relevant factors of *each* lien were considered[14] and its potential enforceability determined.[15]

In any event, there was certainly evidence indicating that *some* of the liens would have been enforceable against Lederman. Indeed, Attorney Schwarcz testified, without dispute, that when this transaction arose, Lederman was already subject to a wage garnishment order in connection with one of the obligations giving rise to one of the liens. He also testified that Lederman had signed a personal guarantee with respect to one of the liens, on which he had made a $185,500 payment.[16] Lederman's real estate expert testified that $240,000 in debts against the property named Lederman herself. Her damages expert testified that number exceeded $484,000.

It is also clear, however, that at least *some* of the money paid by Attorney Schwarcz on the liens should in no way be charged against Lederman. Specifically,

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[14] Indeed, no legal analysis identifying the relevant factors in real property and community property law was made, either by an expert witness or the court. For example, a number of questions were simply not addressed: Is the enforceability of the debt determined by the date of the misconduct, judgment, or attachment of lien? Is this compared to the date of separation, divorce, or the quitclaim deed between spouses? Are there any additional factors when the liens in question are tax liens?

[15] Apparently, Attorney Schwarcz litigated some of the liens. Any judicial determination in such other actions as to the enforceability of those liens would certainly be relevant, if not binding on the Schwarczes.

[16] Attorney Schwarcz also testified to a $19,450 payment on a lien that purportedly arose from a transfer of the Hillcrest house to Lederman from her ex-husband that "was deemed by a court as a fraudulent conveyance," although this testimony may have been stricken.

included in the total amount Attorney Schwarcz paid on the liens is $282,500 he and his wife paid to purchase one of the liens. Clearly, Lederman should not be required to compensate the Schwarczes in any way for their purchase of this lien.

c. *The Rexford Condominium*

It is undisputed that the Schwarczes paid the down payment on the Rexford condominium. The dispute surrounds the circumstances in which that payment was made. Lederman repeatedly testified that the down payment was the initial $125,000 that the Schwarczes paid her for the Hillcrest house. In other words, although the Schwarczes made the payment, they did so with money they owed Lederman under the Hillcrest house purchase agreement.[17]

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[17] In response to a letter from this court indicating our tentative view that "the Rexford condominium was purchased with funds owed to Lederman pursuant to the Hillcrest house purchase agreement," Lederman responded with a letter stating that, "[t]he record does not support the conclusion that the Rexford condo was purchased with funds owed to Lederman pursuant to the Hillcrest purchase agreement." Lederman instead argues that the funds used for the Rexford condominium down payment were the Schwarczes' own funds, which the Schwaczes then repaid to themselves from funds derived from the refinance of the Hillcrest house. While we question whether Lederman's view of the facts would support the legal conclusion that the Rexford condominium could therefore be considered to have been purchased with funds from the Hillcrest house, Lederman's view of the facts on appeal can be disregarded because it is completely at odds with her own trial testimony. Lederman testified that Attorney Schwarcz told her "that it wouldn't be a good idea to have the money, the $125,000, that they were going to give me as a down payment on the Hillcrest house, in my name. And, therefore, they would make it as a down payment on the property that I was going to buy . . . ." She later testified that the Rexford property was always hers, and that she "paid the money for it." When asked whether she ultimately negotiated down the $125,000 down payment she had been promised for the Hillcrest house, she explained, "The only difference was, I never got it because I was told [that] for my own protection, that they – David Schwarcz would put that into the Rexford, the property as the down payment for the Rexford property. So, that he was transferring money that he was supposed to give for me to put in my pocket instead of me having to take out of my

The Schwarczes, however, testified that they purchased the Rexford condominium with their own funds. Caroline Schwarcz testified that she did so because Lederman refused to move out of the Hillcrest house unless she had a place to go; Caroline Schwarcz decided to purchase the condominium for herself and rent it to Lederman.[18]

d. *The Measure of Damages*

Lederman offered the testimony of a forensic accountant as an expert in economic damage analysis.[19] The expert offered two alternative calculations of damages – one purportedly based on contract and the other purportedly based on breach of fiduciary duty.

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pocket and make a down payment on the Rexford property of $125- -- which now turned out he didn't even spend that. So he even owes me more, but . . . that's what happened." Yet again, she testified, "I was always the owner of the Rexford property regardless of what you have on documents. I was always the owner. I always understood I was the owner. The money that I was supposed to get as a down payment on my home, on Hillcrest, was to be the down payment on the Rexford property. I made all of the mortgage payments to a point. I made every single one of the HOA payments, and I paid the property tax to a point. I was always the owner of the Rexford property. I was never a tenant. I never paid rent." For Lederman to now assert that the Schwarczes purchased the Rexford condominium with their own funds (ultimately paid back through the Hillcrest house refinance) is wholly disingenuous.

[18] If this view of the facts is true, however, the Schwarczes did not pay Lederman the $125,000 they had admittedly promised her. The Schwarczes claimed that the $125,000 was paid partly by the $60,000 check to Providential. The testimony was unclear as to the remaining $65,000, with the Schwarczes at times testifying that they credited Lederman this amount for repairs they had made to the Hillcrest house, and at other times testifying it was a credit for her rent on the Rexford condominium. To the extent the jury and trial court rejected this testimony as unworthy of belief, such conclusion is well-supported.

[19] The Schwarczes offered no expert testimony on damages.

The expert's damage calculation on contract was based on the premise that the contract would be voided and the value of the Hillcrest house would be returned to Lederman. The expert did *not* assume that the Hillcrest house would in fact be returned to Lederman, but rather compensated Lederman for the current value of the Hillcrest house. When the expert began testifying to this measure of damages, defendants objected, stating that voiding the contract is not an appropriate measure of damages; the trial court overruled the objection.

The expert started with the $4.2 million present value of the Hillcrest house. She further calculated the remaining balance on the original $275,000 mortgage on the house, if that mortgage were to have remained in place. That amount was $145,500. The expert subtracted that amount from the $4.2 million value, and concluded that, if this contract had never happened, Lederman would be in possession of a house with $4,054,500 in equity.

The expert added to this amount $101,492. This sum was the result of a rather complex calculation[20] in which the expert considered the benefits and burdens to each party over the term of the transaction, and ultimately concluded the Schwarczes received a net advantage of $101,492. The expert's calculation of this number assumed that the Hillcrest house was Lederman's property (on which the Schwarczes should

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[20] Neither of the parties have seen fit on appeal to provide this court with the trial exhibits used by the expert. The absence from the record of the expert accountant's calculations makes it largely impossible for this court to understand the expert's testimony, as she frequently referred to her charts, rather than testifying to actual numbers.

have paid her rent) and the Rexford condominium was the Schwarczes' property (on which Lederman should have paid the Schwarczes rent).[21] It gave the Schwarczes no credit for paying any of the liens, as the expert had been directed to assume that they never should have been paid. Adding the $101,492 net advantage to the Hillcrest house equity, the expert determined a total "contract" measure of damages of $4,155,992.

In her "breach of fiduciary duty" calculation, the expert simply determined that the Rexford condominium had been acquired for a price of $425,000, and had sold for $799,000.[22] The difference between these amounts is $374,000. The expert added this amount to the "contract" damages above, and posited breach of fiduciary duty damages of $4,529,992. In argument to the jury, Lederman's counsel argued both of his expert's numbers, in the alternative.[23]

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[21] The calculation also appeared to take into account the amounts the Schwarczes paid on the refinanced mortgages, the amounts the Schwarczes took for their own benefit from the refinanced mortgages, the property taxes on both properties, the amount of the unlawful detainer judgment against Lederman, and the Rexford condominium homeowners' association dues.

[22] The source of this number is unclear. Caroline Schwarcz testified that the Rexford condominium was currently in escrow (held up by a lis pendens in connection with the instant action) for $830,000.

[23] The additional amount for breach of fiduciary duty was argued on the basis that, if the lower amount of "contract" damages is awarded, the Schwarczes would receive the profit from the sale of the Rexford condominium. Lederman's counsel stated, "We don't think they should be entitled to those profits, as well" since a fiduciary cannot benefit from his wrongful acts. The argument seems odd as the premise of the expert's benefit/burden calculation was that the Rexford condominium was, in fact, the property of the Schwarczes. In other words, Lederman apparently sought breach of fiduciary duty damages for profits the Schwarczes made in selling *their own property*.

The jury was properly instructed that, for breach of contract, "The purpose of damages is to put plaintiff in as good a position as she would have been if defendants had performed as promised." The jury was also instructed that damages for breach of fiduciary duty consist of "any loss or depreciation in the value of the fiduciary estate resulting from the breach of fiduciary duty, with interest," "any profit made by defendants through the breach of fiduciary duty, with interest," and "any profit that would have accrued if the loss of profit is the result of the breach of fiduciary duty." Finally, the jury was instructed that fraud damages include the fair market value of what Lederman gave up less the fair market value of what she received, together with any amounts she reasonably spent in reliance on the defendants' misrepresentations.

4. *The Jury Verdict and Post-Trial Proceedings*

The jury returned a special verdict finding defendants were liable for breach of contract, breach of fiduciary duty, fraud, and conversion of Lederman's property left in the house. While the special verdict form sought individual verdicts on each cause of action, damages were not requested to be allocated. The jury awarded Lederman $2,718,936 in economic damages, and an additional $2 million in non-economic damages.[24] A bifurcated trial on punitive damages resulted in an additional award of $500. It is not apparent from the record on what basis the jury calculated its award of

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[24] The Schwarczes argue in passing "that there was no competent evidence on . . . emotional distress." This argument is essentially an "excessive damages" argument, which is barred on appeal by the Schwarczes' failure to raise it in a motion for new trial. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.)

economic damages;[25] it is only clear that the jury did not award either amount suggested by Lederman's expert.

Thereafter, the court held a hearing on Lederman's equitable causes of action. The court told Lederman's counsel, "All I'm interested in is one thing, whether you've elected to void the contract or not." Lederman's counsel responded, "We are electing to void the contract." The court stated, "That's all I wanted to know. If you're electing to void the contract then I'm going to proceed from that point on. If you void the contract I can tell you what I'm going to do based on the jury finding. I don't need to hear anything more as far as evidence is concerned. I've heard all of the evidence." Further argument was held, and the court ultimately issued its judgment quieting title to both the Hillcrest house and the Rexford condominium in Lederman with "no offsets and no reduction of damages." The Schwarczes argued that this constituted double recovery; the court responded that it is not, because "it all stems from taking the money out of the first property."[26] The court explained, "The court has concluded that defendants are not entitled to any offsets because the liens were paid off from refinancing of the property. There's no credible evidence that defendants made any use of any funds other than

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[25] We note that the expert testified that the total amount the Schwarczes borrowed on the Hillcrest house which they used to pay off the liens was $910,236. This is the only number in the record which ends with "36," as did the jury's economic damage award.

[26] At one point, the court stated the jury's award consisted of "a lot of money for interest" and "the fair market value of the property, the difference." On appeal, Lederman suggests the court "simply misspoke," and that the jury did not award the fair market value of the property, but the loss in equity of the Hillcrest house occasioned by Attorney Schwarcz's unnecessary payment of the liens.

those derived from refinancing of the property. If any of the funds of their own were used, it is as a result of their own wrongdoing in creating a transaction that constituted a fraudulent conveyance which resulted in loss of the homestead exemptions and payment of liens that were questionable at best."

Judgment was entered, indicating that the Court found that "(i) the purported sale of the Hillcrest [house] by [Lederman] to [the Schwarczes] was incomplete, ineffective and is void *ab initio* for all purposes, [and] (ii) that [Lederman], not [Caroline Schwarcz] acquired the Rexford [condominium] in July 1999, using funds derived from [Lederman]'s assets, and [Lederman] has owned and continues to own the Rexford [condominium] since its acquisition." The judgment awarded Lederman both properties, subject to their current mortgages, and the full amount of the jury's verdict. The Schwarczes filed a timely notice of appeal.[27]

CONTENTIONS OF THE PARTIES

On appeal, the Schwarczes contend the trial court improperly awarded double recovery by awarding Lederman both properties, as well as an economic damage award which must have, at least in part, included the value of the properties. Lederman responds that there is no double recovery, the trial court imposed a constructive trust on the properties, and the economic damage award can be interpreted as not encompassing any award for the value of the properties.

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[27] The Schwarczes filed a petition in bankruptcy, which stayed pursuit of this appeal. Relief from the stay was granted and the appeal was reinstated.

DISCUSSION

1. *Breach of Contract Damages*

We begin with a discussion of the two different measures of damages that could be applicable to this case. First, we consider breach of contract damages. That is, the measure of damages for a breach of contract when the plaintiff chooses *not* to rescind the contract but to sue for its breach. "For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) Contract damages compensate a plaintiff for the lost expectation interest. This is described as the benefit of the bargain that full performance would have brought. (*Akin v. Certain Underwriters at Lloyd's London* (2006) 140 Cal.App.4th 291, 298.) Contract damages "awarded should, insofar as possible, place plaintiff in the same position he would have been had the contract been performed, but he should not be awarded more than the benefit which he would have received had the promissor performed." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co., supra,* 66 Cal.App.3d at p. 123.)

Considered rather more concretely, breach of contract damages in the instant case would "perform" the agreement for the sale of the Hillcrest house to the Schwarczes. The Schwarczes would own the Hillcrest house and Lederman would own the Rexford condominium. Lederman would be entitled to her damages under the contract, consisting of the payment Attorney Schwarcz promised but never made. That is, she would recover the additional payment to which she would have been entitled had

Attorney Schwarcz properly performed his obligation to reduce the liens. This would consist of a minimum of $750,000 (if the jury concluded this was a term of the contract) and possibly be as high as $1.5 million (if the jury concluded Attorney Schwarcz overpaid the liens and *should have* further reduced them, entitling Lederman to a greater payment). Certain offsets would need to be taken as well. For example, to the extent the Schwarczes paid Lederman's mortgage on the Rexford condominium, the Schwarczes would be entitled to a credit. However, to the extent the Schwarczes evicted Lederman from the Rexford condominium and obtained a judgment against her, Lederman would be entitled to a credit.

2. *Rescission Damages*

We next consider rescission damages. That is, the measure of damages to which a plaintiff is entitled when, upon breach of the contract, the plaintiff chooses to rescind. Civil Code section 1692 governs relief based on rescission. It provides, in pertinent part, "A claim for damages is not inconsistent with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any consequential damages to which he is entitled; but such relief shall not include duplicate or inconsistent items of recovery. [¶] If in an action or proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties." "Although a plaintiff generally is entitled to damages under section 1692, the remedy intended by the statute is rescission

damages, i.e., damages that would restore the plaintiff to the position that she would have been in if [she had] not entered the contract." (*Akin v. Certain Underwriters at Lloyd's London, supra,* 140 Cal.App.4th at p. 296.) " 'Rescission' means to 'restore the parties to their former position.' "[28] (*Nmsbpcsldhb v. County of Fresno* (2007) 152 Cal.App.4th 954, 959.) " 'The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received.' " (*Id.* at pp. 959-960.)

We consider this measure of damages in the factual context of this case. Here, the parties would be returned to their initial positions with respect to ownership of the properties. Lederman would own the Hillcrest house and the Schwarczes would own the Rexford condominium. (We repeat that it is undisputed that the Schwarczes purchased the Rexford condominium. Lederman testified that they purchased it with the $125,000 that they owed her under the contract. If the contract is rescinded, Lederman has no right to the $125,000, and therefore, no claim to the Rexford condominium.) Offsets for rent and mortgage payments made while each party lived in the other's property would have to be calculated. Moreover, the Schwarczes' refinancing of the Hillcrest house and their payment of the liens would have to be taken into account. To the extent the current debt on the Hillcrest house is attributable to

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[28] When a party chooses to rescind the contract, the contract is voided. (*BGJ Associates v. Wilson* (2003) 113 Cal.App.4th 1217, 1229.) Lederman argues that she "did not elect to *rescind* the contract. She elected to *void* it, meaning she elected *not to form (to accept) the contract* that was offered her." This is precisely the definition of rescission.

amounts *properly* paid on liens (or improvements made to the property), Lederman should be liable for that debt. However, to the extent the funds obtained from refinancing the house were used to pay liens that should not have been paid, or were used to benefit the Schwarczes, Lederman should receive a credit. Similarly, whether the Schwarczes should be reimbursed for payments made on the liens from their own funds depends on whether those particular liens would have been enforceable against the Hillcrest house if Lederman had never sold it to the Schwarczes.[29]

3. *The Judgment Must Be Reversed*

In this case, the jury was instructed on the measure of breach of contract damages, but *not* on the measure of rescission damages. After the jury returned its verdict, the trial court rescinded the contract, but made no recalculation of damages and impliedly concluded that the economic damages awarded by the jury were proper consequential damages allowable when a plaintiff rescinds.

The court's award was erroneous on three bases. First, while Lederman valiantly scours the record for evidence which could conceivably support an award of $2,718,936 as proper rescission damages (without any breach of contract damages or award for the

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[29] To the extent that the Schwarczes argue that rescinding the contract should result in the elimination of the non-economic damage award, we disagree. The claim for the emotional distress Lederman suffered as a result of the Schwarczes' tortious misconduct does not depend on her confirmation of the contract. (Compare *BGJ Associates v. Wilson, supra*, 113 Cal.App.4th at pp. 1231-1232 [once a party has voided a contract, no causes of action premised on the contract may be successfully pursued].) The Schwarczes have not presented, and independent research has not disclosed, any authority that emotional distress damages cannot be recovered for tortious acts when the plaintiff has rescinded a related contract.

value of the property),[30] we cannot agree with Lederman's analysis for the simple reason that the jury was not instructed on the proper measure of damages when rescission is awarded. While the failure to instruct on such damages was not error at the time the jury was instructed (as a rescission award was not then contemplated) the trial court's subsequent award of rescission throws considerable doubt on the propriety of the jury's calculation of damages. We find it inconceivable that the jurors *anticipated* the court's eventual award of rescission and calculated economic damages in accordance therewith on a basis on which they had not been instructed.[31]

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[30] We do not mean to imply that we conclude Lederman's proposed calculation is, in fact, legitimate. Lederman suggests the jury could have awarded both the $836,000 savings the Schwarczes realized by paying only mortgage payments rather than fair rental value on the Hillcrest house *and* the expert's net benefit/burden amount of $101,492. The former figure appears to have been taken into account in the expert's calculation of the latter.

[31] Lederman suggests that the Schwarczes cannot pursue this claim on appeal as it is an assertion of excessive damages which must first be raised in a motion for new trial. "The failure to move for a new trial, however, does not preclude a party from urging legal errors in the trial of the damage issue such as erroneous rulings on admissibility of evidence, errors in jury instructions, or failure to apply the proper legal measure of damages." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co., supra,* 66 Cal.App.3d at p. 122.)

" 'A judgment may not be reversed for instructional error in a civil case "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." [Citation.] . . . [¶] Instructional error in a civil case is prejudicial "where it seems probable" that the error "prejudicially affected the verdict." . . . [¶] . . . Thus, when deciding whether an error . . . was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' " (*Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1757.) As the jury was not instructed on rescission damages, the expert did not calculate rescission damages, counsel never sought rescission damages, and the trial court had not yet awarded

Second, regardless of the trial court's award of monetary damages, the court's equitable award was flawed. Specifically, the trial court erred in awarding Lederman the Rexford condominium in addition to the Hillcrest house, when considering the contract to be void *ab initio*. The undisputed evidence is that the $125,000 down payment on the Rexford condominium was made by the Schwarczes out of their own funds. The court's judgment states that the funds were "derived from [Lederman]'s assets." This is simply unsupported by the evidence. The funds were not, for example, derived from a refinance of the mortgage on the Hillcrest house; the Rexford condominium was purchased months before the first refinance. The funds belonged to the Schwarczes and were given to Lederman as a down payment on the purchase of the Hillcrest house. Returning the parties to their positions prior to the contract results in the return of the Hillcrest house to Lederman and the return of the $125,000 down payment – and, therefore, the Rexford condominium – to the Schwarczes.[32]

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rescission, we have no difficulty in concluding the error prejudicially affected the damages.

[32] On appeal, Lederman attempts to save the award of both properties by characterizing the trial court's act as the imposition of a constructive trust, rather than rescission. Preliminarily, the court did not impose a constructive trust; the court declared the contract void *ab initio*. In any event, a constructive trust theory does not assist Lederman as the remedy of constructive trust would only result in Lederman receiving the Rexford condominium if it had been purchased with funds derived from the trust estate, i.e. the Hillcrest house. (13 Witkin, Summary of Cal. Law, (10th ed. 2005) Trusts, § 319, p. 894; see Prob. Code, § 16440.) As stated above, the evidence does not support this conclusion.

Lederman cannot assert a constructive trust over the Rexford condominium on the basis that the Schwarczes committed an *independent* breach of trust with respect to the Rexford condominium – specifically, by violating their promise to hold the Rexford condominium in trust for her. That promise necessarily was an integral part of the

Finally, the judgment must be reversed because the trial court refused the Schwarczes any opportunity to present evidence of offsets. When the Schwarczes attempted to offer evidence of offsets at the jury phase of the trial, the court sustained its own objection on the basis of relevance. At the equitable phase of the trial, the court indicated that it did not need to hear any further evidence.[33] Offsets, such as funds the Schwarczes may have invested in improving the Hillcrest house and paying off valid liens, are relevant to a proper calculation of rescission damages.

We will therefore reverse the judgment and remand for a redetermination of Lederman's economic damages under the rescission remedy she apparently elected.[34] Specifically, the trial court must restore both parties to the positions they had been in had there been no contract. Had there been no contract, Lederman would have always owned the Hillcrest house and the Schwarczes would have always owned the Rexford condominium. The Schwarczes would be charged with the fair rental value of the

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original, but now void, contract; it arose from the down payment on the Rexford condominium being made by the Schwarczes in partial consideration for purchase of the Hillcrest house. Having voided the contract for the purchase of the Hillcrest house, Lederman has no claim to the consideration she received under it.

[33] The court also stated that there was "no credible evidence that defendants made any use of any funds other than those derived from refinancing of the property." But the court had precluded the Schwarczes from offering such evidence. Moreover, Lederman's own expert testified that the Schwarczes had used some $98,000 of their own money to pay off the liens.

[34] We leave it to the trial court, however, to determine, in the first instance, whether Lederman is to be bound by her election to rescind the contract, and any effect of subsequent events on this election. Specifically, the parties have indicated that Lederman has sold the Hillcrest house. Whether she has done so, and whether having done so would prevent Lederman from electing a contract remedy, are issues for the trial court.

Hillcrest house, with an offset for mortgage payments, property taxes, and improvements they made to the property. Likewise, Lederman would be charged with the fair rental value of Rexford, with an offset for mortgage payments, property taxes and HOA dues she paid. As to the refinancing of the Hillcrest mortgage, a determination must be made as to how all of the funds were used. Specifically, it must be determined how much of the money taken from Hillcrest's equity was *properly* paid on the liens – that is, the amount paid on liens that would have been enforceable against Lederman. As these amounts would have otherwise been paid by Lederman, they are properly chargeable against her. However, the amounts paid on liens that would not have been enforceable against Lederman should not have been paid. The Schwarczes would therefore be responsible for these amounts, as well as any amounts from the refinance which the Schwarczes used for their own benefit.[35]

[35] In her letter brief in response to this court's inquiry, Lederman suggests that rescission is an improper remedy because Attorney Schwarcz provided legal services in exchange for the Hillcrest house, and that legal services, once rendered, cannot be returned. Should the trial court conclude that, in the midst of Attorney Schwarcz's breach of fiduciary duty to his client, he somehow performed proper and valuable legal services (perhaps by obtaining a reduced pay off of a lien otherwise enforceable against Lederman), the court can compensate Attorney Schwarcz for his work in quantum meruit as a part of the calculation of the rescission damages to be awarded to Lederman.

DISPOSITION

The judgment is reversed and the matter remanded for further proceedings consistent with the views expressed in this opinion. The parties shall bear their own costs on appeal. The clerk of this court is directed to forward a copy of this opinion to the California State Bar for whatever action that entity deems appropriate.[36]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.

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[36] Business and Professions Code section 6086.8, subdivision (a) provides, "Within 20 days after a judgment by a court of this state that a member of the State Bar of California is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity, the court which rendered the judgment shall report that fact in writing to the State Bar of California." Our reversal of the trial court's judgment does not undermine the jury's verdict regarding Attorney Schwarcz's liability; and our resolution of the appeal may be useful to the State Bar in any investigation it may choose to conduct.